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Written statement* submitted by International Federation for Human Rights Leagues, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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Business and Human Rights: Time for Genuine Progress

FIDH (the International Federation for Human Rights) appreciates the opportunity to make this first submission to the open-ended intergovernmental working group on transnational corporations and other business enterprises (IGWG) tasked with the elaboration of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[1]

FIDH has continuously advocated for further clarification and codification of existing obligations to ensure effective protection and redress for those negatively affected by the activities of businesses[2]. As a member of the Treaty Alliance[3], FIDH and over 600 civil society organizations and social movements are calling on the UN to elaborate an instrument that will respond to the needs and priorities of those affected[4].

FIDH and its member organizations document cases of corporate-related human rights abuses on all continents. Ranging from operations in conflict situations to supply chain issues, violations include extra-judicial killings, detentions, criminalization of human rights defenders and repression of social protests, deprivation of means of subsistence, child labor and environmental pollution[5]. Human rights defenders denouncing corporate abuses are under increasing pressure and victims of harassment and assassinations are rising[6]. Rights-holders continue to suffer an array of human rights violations, with the situation worsening in some cases, despite increased attention on these issues at the international level over the last decade. Access to justice remains virtually nonexistent for the majority of victims.

FIDH calls on States to build on existing international instruments and initiatives, including the UN Guiding Principles on Business and Human Rights. States should ensure that the treaty process be guided by the principles of participation, transparency and legitimacy. Discussions must address the full range of governance gaps noted by former UN Special Representative on Business and Human Rights, including by reaffirming the primacy of human rights over trade and investment agreements and by addressing the cross-border nature of corporate-related human rights abuses[7]. The treaty, and the process itself, must contribute to strengthening national and regional frameworks and ensure robust and effective enforcement mechanisms.

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[1]Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RSE/26/9 (26 June 2014).

[2]See e.g., FIDH, "Business and Human Rights: Enhancing Standards and Ensuring Redress", Briefing Paper, March 2015, https://www.fidh.org/International-Federation-for-Human-Rights/united-nations/human-rights-council/un-human-rights-council-25th-regular-session/14899-business-and-human-rights-fidh-calls-on-the-international-community-to

[3] The Treaty Alliance is an alliance of committed networks and campaign groups around the world are joining to collectively help organize advocacy activities in support of developing a binding international instrument to address corporate human rights abuses. For more information see: http://www.treatymovement.com

[4]Treaty Alliance Statement, Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse, 2015; and Treaty Alliance, 2013 Joint Bangkok Statement, available at: http://www.treatymovement.com

[5]See for example: "Large-scale mining in Ecuador and human rights abuses: the case of Corriente Resources Inc.", FIDH, CEDHU, Rights and Democracy, December 2010, available at: https://www.fidh.org/IMG/pdf/Exec Summary Large-scale_Mining_Human_Righs_Ecuador-LD.pdf; Cambodia: Land Cleared for Rubber, Rights Bulldozed: The impact of rubber plantations by Socfin-KCD on indigenous communities in Busra, Mondulkiri. FIDH, October 2011, available at: https://www.fidh.org/IMG/pdf/report_cambodia_socfin-kcd_low_def.pdf ; How much are human rights worth in the Brazilian mining and steel industry? The human rights impact of the steel and mining industry in Açalândia. FIDH, Justiça Global, Justiça Nos Trilhos, May 2012, available at https://www.fidh.org/IMG/pdf/report_brazil_2012_english.pdf ; Orange's dangerous liaisons in the Occupied Palestinian Territory, FIDH, CCFD-Terre Solidaire, Al Haq, AFPS, LDH, CGT, SUD, May 2015, available at https://www.fidh.org/IMG/pdf/rapport_orange-eng.pdf

[6]See for example "We are not afraid" Land rights defenders: attacked for confronting unbridled development", FIDH, December 2014, available at: https://wearenotafraid.org/en/

[7]See "Business and Human Rights: Enhancing Standards and Ensuring Redress", FIDH, March 2014.

PROCESS

Ensuring rights-holders participation and a gender-sensitive approach

Transparency and rights-holders' participation must be foundational to this process. Rules guiding the process must encompass the needs and realities of people and communities whose human rights have been infringed, or are being threatened, by corporate conduct. Rights-holders consist of individuals, groups or peoples who are at risk of human rights abuses to their lives, communities, land or environment by corporate activities. They include but are not limited to vulnerable and marginalized groups such as indigenous communities and human rights defenders. A gender-sensitive approach must be followed throughout the entire process.

The IGWG must actively facilitate the participation of rights-holders and civil society organizations working with them. Following the example led by the NGO Coalition for the International Criminal Court during the drafting of the Rome Statute, civil society groups with the objective of promoting and protecting human rights should be given primacy during the negotiation process. The participation, experiences, and needs of directly affected rights-holders must inform and guide the drafting process.[8]

A transparent and good-faith process

FIDH calls on all States to actively engage in good faith in the IGWG. All stakeholders should officially be consulted and invited to share their perspectives through an inclusive and constructive dialogue.

Participating officials must act in a manner that is fully consistent with their human rights obligations and ensures their compliance with and fulfillment of such obligations. States must preserve their integrity from undue influence by private actors whose primary objective falls outside the promotion of human rights.[9] The procedures must safeguard the IGWG from corporate capture, whereby corporate interests are prioritized over peoples' interests in processes and institutions.[10] All parties involved in the negotiations should publicly disclose their proposals and positions. All experts assisting delegations must disclose any circumstances that may present a conflict of interest.

SUBSTANCE

Scope of the instrument

The treaty must address challenges currently faced by those affected by corporate harm when seeking prevention, accountability and remediation. FIDH urges for the elaboration of a treaty that encompasses all existing human rights obligations arising from international and regional treaties, statutes and agreements, as well as any other relevant instruments, including the UN Declaration on the Rights of Indigenous Peoples. This is consistent with the principles of indivisibility, universality and interdependence of all human rights. The treaty must thereby ensure that it can address the array of violations victims currently face.

In 2015, ESCR-Net & FIDH launched the Treaty Initiative project[11], a project bringing together legal experts from all regions to form an Expert Legal Group (ELG) to work with civil society in all global south regions to develop legal proposals to feed the IGWG's discussions, including with regard to the treaty's breadth[12].

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[8]See Unity Statement produced by the participants in the Asia Pacific Regional Conference, Asia Pacific Civil Society's demands for the Legally Binding Treaty on Business and Human Rights, drafted during ESCR-Net, FIDH and APWLD Asia Pacific Regional Consultation, **held in Chiang Mai in May 2015,** https://www.escr-net.org/node/366236

[9]See Treaty Alliance Statement, Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse, 2015, available at: http://www.treatymovement.com/statement

[10] Ibid.

[11]ESCR-Net & FIDH Treaty Initiative Project, https://www.escr-net.org/cawg/treatyinitiative

[12]See Working Paper of the ESCR-Net & FIDH Treaty Initiative
, Surya Deva (Lead author for the Expert Legal Group)

Inclusion of all business enterprises

FIDH firmly believes that a legally binding instrument must address the human rights violations arising from the activities of all business enterprises. It is critical that the treaty addresses the cross-border nature of corporate-related activities and abuses. The treaty must address ways to ensure accountability for parent companies, subsidiaries, contractors (whether corporate or government contractors) and entities in the supply chain.

All businesses, including State-owned enterprises and local businesses, are susceptible of having a negatively impacting on human rights in impunity,, and as a result of governance gaps, deficiencies, inadequate enforcement of national laws and impunity can prevail. From a victim's perspective, the formal character of a business is irrelevant; rather victims focus on the need to access to effective remedy and reparation for the harms they have suffered. Since the treaty will centralize the needs of persons and communities adversely affected by business activity, it should t address all business enterprises that can potentially cause or contribute to human rights abuses.

Prevention

Under international law, States have a duty to protect human rights by regulating the behavior of non-state actors, including private actors.[13] States are expected to take all reasonable measures in order to prevent private actors from adopting conduct that may lead to human rights violations. FIDH strongly believes the treaty must oblige States to adopt regulatory measures to prevent corporate abuses to human rights. This includes requiring business enterprises to adopt policies and procedures that seek to prevent, stop and redress negative human rights impacts wherever they operate or cooperate, and to establish enforcement mechanisms, to the extent either does not currently exist or is insufficient. States' duty to protect must – at a minimum- be interpreted as applying to both home and host States.

The treaty should clarify the nature or scope of conduct by a business entity that will give rise to legal liability, including criminal liability, such as aiding and abetting and other forms of complicity. Companies should be subjected to appropriate sanctions for failing to respect human rights, including for failure to adopt or comply with internal policies and procedures. Through this international instrument, the obligation on States to translate these standards into national legislation shall be explicitly set forth.

Remediation

Finally, States must be required to put in place effective monitoring, enforcement and remedy mechanisms. Under international law, States have a duty to provide access to adequate, effective and prompt remedies. The IGWG must prioritize access to justice and reparation for victims. National jurisdictions are largely failing to meet this obligation, as recently highlighted by the Kiobel decision in the United States[14] and legal aid reform in the UK. Provisions must be included to ensure affected people can – at a minimum – access effective remedies in their own States as well as in the home State of the business enterprise concerned. Provisions should also allow for all other States that may have jurisdiction over the concerned enterprise to ensure access to remedy, such as "where the corporation, or its parent or controlling company, has its centre of activity [...] or has its main place of business or substantial business activities [...][15]". Provisions should address States' obligation to cooperate in preventing, punishing and ensuring enforcement, including for instance through mutual and legal assistance. Strengthening the international normative framework will

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See Working Paper on the 'Scope' of the Business and Human Rights Treaty, Surya Deva, ESCR-Net & FIDH Joint Treaty Initiative, 22 June 2015Legal Group (ELG) to work on concrete propositions towards a binding treaty on business and human rights.

[13]See e.g. authoritative guidance of UN treaty bodies. CERD, "Concluding Observation of CERD: Canada", CERD/C/CAN/CO/18, 25 May 2007; Committee on the rights of the child,General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013. See also Concluding observations of the Committee on Economic, Social and Cultural Rights in 2013 for Austria (E/C.12/AUT/CO/4), Norway (E/C.12/NOR/CO/5) and Belgium (E/C.12/BEL/CO/4).

[14]See Kiobel v. Royal Dutch Petroleum, Co.133 S.Ct. 1659 (2013).

[15]See e.g. the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights", September 2011Article 25 (c): Bases for protection States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means... as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.

reinforce national and regional frameworks. In line with the principle of complementarity, the treaty should support the establishment of supra-national remedial mechanisms.

Any international instrument resulting from this process should contribute to further clarify and codify existing obligations and ensure redress for corporate-related abuses. Building upon hard and soft law standards set thus far, it should under no circumstances represent a regression or dilution of existing human rights standards.